

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of )  
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AT&T INC. PETITION FOR FORBEARANCE )  
FROM THE COMMISSION'S COST )  
ASSIGNMENT RULES )  
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WC Docket No. 07-21

**REPLY COMMENTS OF  
NUVOX COMMUNICATIONS,  
COVAD COMMUNICATIONS GROUP, INC., AND  
XO COMMUNICATIONS, LLC**

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April 9, 2007

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**I. INTRODUCTION**

NuVox Communications, Covad Communications Group, Inc., and XO Communications, LLC (hereinafter, "CLEC Joint Commenters"), through the undersigned counsel, hereby reply to the initial round of comments in the above-captioned docket on AT&T's Petition for Forbearance from the Commission's Cost Assignment Rules ("Petition").<sup>1</sup> The Federal Communications Commission ("FCC" or "Commission") should reject AT&T's request for forbearance from generally applicable cost assignment rules. Grant of AT&T's request would deny the FCC, state commissions, and the public the information necessary to engage in meaningful oversight of AT&T. Accordingly, AT&T's Petition does not satisfy the standard for grant of forbearance petitions and should be denied.

<sup>1</sup> *Pleading Cycle Established for AT&T Inc. Petition for Forbearance From the Commission's Cost Assignment Rules*, Public Notice, WC Docket No. 07-21 (rel. Feb. 16, 2007).

## **II. THE REGULATIONS FOR WHICH AT&T SEEKS FORBEARANCE ARE NECESSARY FOR EFFECTIVE RATE REGULATION AND OTHER CRITICAL REGULATORY FUNCTIONS**

CLEC Joint Commenters agree with those commenters that oppose the Petition on grounds that the regulations for which AT&T seeks forbearance are necessary for effective rate regulation and other critical regulatory functions.<sup>2</sup> AT&T proposes to eliminate rules which assign costs between the state and federal jurisdictions – information necessary to determine AT&T’s earnings for any individual state. Without this information, it will be impossible for any regulatory body to appropriately assess AT&T’s market position, thus limiting the ability of regulators to make informed decisions regarding the reasonableness of its conduct, returns and rates.<sup>3</sup> AT&T’s Petition also proposes to effectively eliminate critical affiliate-transaction rules, which would allow it to shift costs between regulated and unregulated services. Such cost shifting could result in the improper subsidization of unregulated services. Also of particular concern, the Petition would exempt AT&T from requirements that it provide cost data on its special access and switched access charges, without which state and federal regulators will be unable to ensure that prices are kept at just and reasonable levels. Because of these failings, and others, AT&T’s Petition should be rejected in its entirety.

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<sup>2</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516 (2006); *Opposition of Sprint Nextel Corporation*, WC Docket No. 07-21, 20 (filed Mar. 19, 2007); *Opposition of Time Warner Telecom Inc.*, WC Docket No. 07-21, 11-12 (filed Mar. 19, 2007).

<sup>3</sup> *See Comments of State Members of Federal-State Joint Board on Separations*, WC Docket No. 07-21, 8 (filed Mar. 19, 2007) (“[The FCC’s Part 36 rules] allocated precisely 100 percent of total costs for recovery, and it produced a clear jurisdictional allocation that States could use in setting intrastate rates . . . [G]ranting forbearance would mean that these rules would no longer be available.”).

**A. Price Cap Regulation Does Not Obviate the Need for Cost Accounting and ARMIS Data to Set or Review AT&T and Other Incumbent LECs' Rates**

Despite AT&T's assertions to the contrary, the cost of service remains a useful input for evaluating the reasonableness of rates, even under the modern price cap plans enacted by the FCC and most states.<sup>4</sup> AT&T's Petition proposes to eliminate rules that assign costs between state and federal jurisdictions (Part 36). Without separated cost reporting, it will not be possible to determine AT&T's earnings for any individual state, making it impossible for state commissions to reevaluate price cap plans when they expire. Furthermore, without the associated period reports on intrastate earnings to monitor, states will have no basis to empirically check any future claim by AT&T that policy changes (such as deregulation or state specific universal service funds) are necessary to offset revenue losses from rate decreases.<sup>5</sup>

State commenters also recognize the importance of this information, writing that "so long as there remains two jurisdictions [*i.e.*, federal and state], cost assignment should at least roughly follow jurisdictional authority and revenue assignment."<sup>6</sup> Indeed, the state commissions need separated cost information to ensure that rates subject to price caps remain just and reasonable.<sup>7</sup> Despite AT&T's assertions that the price cap regulatory scheme obviates the need for costs to be broken down by state, interstate and intrastate rates often "require re-

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<sup>4</sup> See *Verizon v. FCC*, 535 U.S. 467, 487 (2002) ("The price-cap scheme starts with a rate generated by the convention cost-of-service formula, which it takes as a benchmark to be decreased at an average of some 2-3 percent a year to reflect productivity growth . . . subject to an upward adjustment if necessary to reflect inflation or certain unavoidable 'exogenous costs'"); see also *Opposition of Time Warner Telecom* at 4-5.

<sup>5</sup> For instance, data such as that gathered under Part 36 of the Cost Allocation Rules is needed in order to accurately consider claims made by proponents of the Missoula Plan. Similarly, intrastate cost and earnings information would be necessary to address any future claim regarding the need for a state-specific universal service fund. See *Opposition of Time Warner Telecom* at 7.

<sup>6</sup> *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516, Appendix B – *Post Freeze Options for Separations*, at 9 (2006).

<sup>7</sup> 47 U.S.C. §§ 201(b), 202(a).

initialization to incorporate correct separations accounting.”<sup>8</sup> For instance, in 2004, both Indiana and California announced their intention to review cost studies submitted by incumbent LECs in order to determine at what level to set rates.<sup>9</sup> Without this information, such review would be impossible to undertake – states cannot assess the effectiveness of any state regulatory plan without hard metrics as to how the company is operating within that state. In particular, carrier earnings, which require knowledge of both carrier revenue and costs, are a critical component in ensuring that the regulatory scheme promotes peak efficiency.

**B. The Continued Application of Affiliate Transaction Rules Remains Necessary in Order to Prevent AT&T from Engaging in Anticompetitive Practices**

If not limited by the current accounting rules, AT&T would be able to meld its revenues and costs for regulated and unregulated services together, making it impossible to determine relative earnings of different service categories. Moreover, AT&T also proposes to eliminate rules requiring its incumbent LEC affiliates to book the tariffed rates for a service when providing a service to a deregulated affiliate.<sup>10</sup> This comes on the heels of AT&T’s announced plan to rebuild its system as a video entertainment network, with traditional voice service staking only a trivial claim on capacity. Section 254(k) of the Communications Act, as amended, prohibits a carrier from using services that are not competitive to subsidize services

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<sup>8</sup> *Reply Comments of NASUCA et al.*, CC Docket No. 80-286, at 2 (Nov. 20, 2006).

<sup>9</sup> *Opposition of Time Warner Telecom* at 11-12 (citing *Petition of Indiana Bell Telephone Company, Incorporated For the Commission to Exercise its Statutory Authority Under IC. 8-1-2.6 Et Seq. to Decline to Exercise its Jurisdiction, in Whole or in Part, and Use Alternative Regulatory Procedures and Standards and Approve SB Indiana’s Alternative Regulation Plan for the Pricing and Other Regulation of SBC Indiana’s Retail and Carrier Access Services, et al.*, Cause No. 42405, 2004 Ind. PUC Lexis 253, \*18 (2004); *Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the New Regulatory Framework for Pacific Bell and Verizon California Incorporated*, Interim Opinion Regarding Selected Issues Related to the Audit of SBC Pacific Bell Telephone Company, 2004 Cal. PUC LEXIS 55, \*1 (2004)).

<sup>10</sup> *See AT&T Inc. Petition for Forbearance*, WC Docket No. 07-21 (filed Jan. 25, 2007).

that are competitive.<sup>11</sup> Thus, current FCC rules are necessary to monitor whether AT&T's deregulated offerings are being cross-subsidized with its regulated offerings to the detriment of consumers in violation of § 254(k). Only by having the necessary data to ensure that costs are properly allocated between regulated and unregulated services, and between intrastate and interstate services, can the Commission monitor ILEC earnings and curb any efforts to have consumers of regulated services foot the bill for incumbent LEC forays into new unregulated lines of business.<sup>12</sup>

**C. Continued Transparency of the Costs Incurred by AT&T When Providing Special Access and Switched Access Services Is Essential to Prevent Anticompetitive Conduct**

If the Commission approves AT&T's petition for forbearance, both the Commission and the states will be unable to measure the costs AT&T incurs (and therefore the profits it earns) in providing switched and special access services. Currently, the Commission relies upon the cost data reported by AT&T and other incumbents to determine whether the FCC should re-impose price cap regulation on incumbent LEC special access services subject to Phase II pricing flexibility.<sup>13</sup> As to intrastate special access (sometimes referred to as "State private line") services, some state commissions still rely upon cost separations specifically, and cost

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<sup>11</sup> 47 U.S.C. § 254(k).

<sup>12</sup> See *Opposition of Sprint Nextel Corporation*, WC Docket No. 07-21, 19 (filed Mar. 19, 2007); see also *Opposition of Time Warner Telecom* at 18 (arguing that "[a]s long as AT&T's rates are set directly or indirectly with reference to its costs as is the case under a price cap regime, Section 254(k) mandates the continuing operation of Part 64.").

Recently, the U.S. Government Accountability Office criticized the FCC's data collection methodology in regard to its oversight of special access regulation and deregulation: "[W]ithout more complete and reliable data, FCC is unable to determine whether its deregulatory policies are achieving their goals." U.S. GENERAL ACCOUNTING OFFICE, TELECOMMUNICATIONS, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES, GAO-07-80, at 36-37 (Nov. 29, 2006). Thus, rather than eliminating data requirements, the Commission should be seeking to enhance the gathering of higher quality cost data.

<sup>13</sup> See, e.g., *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994, ¶ 29 (2005).

allocations rules more broadly, to evaluate whether special access rates are just and reasonable.<sup>14</sup> Thus, the loss of cost information if AT&T's forbearance petition is granted would negatively impact the effectiveness of regulators at all levels.

Meanwhile, any claims by AT&T that market competition will keep it from raising prices are without merit. The supposed competition in the special access market certainly has not affected the ability of incumbent LECs to charge monopoly rates for special access – in 2005, the special access returns of AT&T, BellSouth, and Verizon were 91.73%, 98.37%, and 41.97% respectively.<sup>15</sup> If AT&T's forbearance petition is granted, this information will no longer be produced, and neither the states nor the Commission will have the opportunity to consider this data in their future rate related proceedings, leaving AT&T free to reap monopoly profits.

The problem is even more pronounced in the switched access market. Carriers paying for terminating access have no control in selecting the terminating incumbent LEC used, and therefore have no competitive alternatives. For this reason, the Commission has never suggested deregulating switched access service. However, granting AT&T's petition would have almost the same effect – without data to evaluate the claims of AT&T that higher access rates are needed, the Commission would have no basis for tracking AT&T's costs to ensure that switched access charges remain just, reasonable, and nondiscriminatory pursuant to sections 201(b) and 202(a) of the Communications Act, as amended.<sup>16</sup> To the extent that reforms in how costs are allocated are needed, the Commission should consider adopting reforms; however, any

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<sup>14</sup> *Comments of State Members of Federal-State Joint Board on Separations* at 10-11.

<sup>15</sup> *Opposition of Sprint Nextel* at 15.

<sup>16</sup> 47 U.S.C. §§ 201(b), 202(a).

need for reform should not be used to justify the complete elimination of cost allocation requirements.

**D. The Commission Should Initiate a Rulemaking to Provide a More Appropriate Vehicle for Considering the Types of Changes Requested by AT&T.**

Before the Commission eliminates a fundamental metric used at both the federal and state levels, a thorough, deliberative and industry-wide discussion should occur. One of the first steps in considering the requested action should be a referral to the Federal-State Joint Board on Jurisdictional Separations for an examination of how the AT&T proposal could affect state accounting and other requirements.<sup>17</sup> Secondly, the Commission should carefully consider the several open proceedings that examine identical issues to those AT&T raises in the Petition at issue here.<sup>18</sup> Considering cost assignment issues in the context of a single forbearance petition could short circuit these pending, and often more comprehensive proceedings.

Finally, the Commission should consider initiating a rulemaking of general applicability to review cost allocation rules for all carriers, and avoid providing special consideration for a select few carriers. AT&T is the largest telecommunications provider in the country. It is made up of numerous affiliated companies providing numerous intrastate, interstate and international services. If the cost assignment rules have any meaning for any company today, surely they are most meaningful in understanding the origins and destinations of

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<sup>17</sup> *Opposition of Sprint-Nextel* at 3-4; *Opposition of Time Warner Telecom* at 19.

<sup>18</sup> *Id.* at 5-6; *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994 (2005); *2000 Biennial Regulatory Regime – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase II, Amendments to the Uniform System of Accounts for Interconnection; Jurisdictional Separations Reform and Referral to the Federal-State Joint Board; Local Competition and Broadband Rulemaking*, Report and Order, FCC 04-149 (2004); *Jurisdiction Separations and Referral to the Federal-State Joint Board*, Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 5516 (2006).

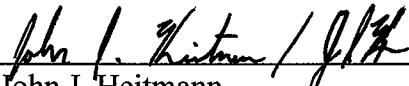


the revenues to and from the various affiliates comprising the conglomerate known as AT&T. Because no telecommunications provider known to CLEC Joint Commenters has nearly as many affiliates offering nearly as many varied services in as many different places as AT&T, rather than grant this forbearance request, the Commission should take this opportunity to examine which of its cost assignment rules need reform for all affected industry participants rather than for this one behemoth.

### III. CONCLUSION

For the reasons set forth herein, the Commission should reject AT&T's Petition for Forbearance and consider opening a new rulemaking of general applicability to consider all of the relevant issues.

Respectfully submitted,

  
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